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February 6, 2015

***VIA ELECTRONIC FILING
AND OVERNIGHT DELIVERY***

Public Utility Commission of Oregon
3930 Fairview Industrial Drive SE
Salem, Oregon 97302-1166

Attn: Filing Center

Re: LC 57—PacifiCorp's Response to Sierra Club's Request to the ALJ to Clarify or Certify ALJ Ruling Granting Sierra Club's Motion

PacifiCorp d/b/a Pacific Power (PacifiCorp or Company) submits for filing its Response to Sierra Club's Request to the ALJ to Clarify or Certify ALJ Ruling Granting Sierra Club's Motion Challenging PacifiCorp's Confidential Designation.

Please contact Natasha Siores, Director, Regulatory Affairs & Revenue Requirement, at (503) 813-6583, for questions on this matter.

Sincerely,

R. Bryce Dalley AS
R. Bryce Dalley
Vice President, Regulation

Enclosures

cc: Chief Administrative Law Judge Michael Grant
Gloria Smith
Service List—LC 57

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

LC 57

In the Matter of
PACIFICORP d/b/a PACIFIC POWER
2013 Integrated Resource Plan.

PACIFICORP'S RESPONSE TO
SIERRA CLUB'S REQUEST TO THE
ALJ TO CLARIFY OR CERTIFY ALJ
RULING GRANTING SIERRA CLUB'S
MOTION

I. INTRODUCTION

PacifiCorp d/b/a/ Pacific Power (PacifiCorp or Company) files this response to Sierra Club's Request to the ALJ to Clarify or Certify ALJ Ruling Granting Sierra Club's Motion Challenging PacifiCorp's Confidential Designation (Request). In its Request, Sierra Club asks the Commission to issue an explicit finding that PacifiCorp violated the protective order in this docket, Order No. 13-095.

Given the long history of this dispute, PacifiCorp is hesitant to file a response to Sierra Club's Request, particularly because Sierra Club's motion lacks any legal or factual basis upon which relief may be granted.¹ The Commission has never issued a show-cause order directed at PacifiCorp, nor conducted any proceedings that would support a finding that PacifiCorp violated the order. Moreover, Administrative Law Judge (ALJ) Shani Pines' January 9, 2015 ruling provides Sierra Club with all relief

¹ Oregon Rule of Civil Procedure 17C, which is applicable to contested case proceedings under OAR 860-001-0000, requires every attorney signing a pleading to certify that the pleading is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; that the legal positions taken in the pleading are warranted by existing law or by a non-frivolous argument for an extension or modification of the law; and that the allegations and other factual assertions in the pleading are supported by evidence. Sierra Club's motion falls short of this standard.

contemplated by the terms of the protective order itself. PacifiCorp nevertheless files this response out of an abundance of caution.

II. STATEMENT OF FACTS

The Commission is familiar with the genesis of the parties' dispute over the protection of confidential information in this docket. On August 6, 2014, the Commission held a confidential workshop in this proceeding to discuss PacifiCorp's analysis of certain investments in emissions control equipment at the Craig and Hayden coal-fired generating plants. At that workshop, PacifiCorp provided copies of a PowerPoint presentation that were marked as confidential under Order No. 13-095. On August 7, 2014, Sierra Club improperly used and disclosed information from the workshop that had been designated confidential in an unrelated proceeding before the Wyoming Public Service Commission. PacifiCorp informed the Commission of the violation in an August 8, 2014 letter.

In response to PacifiCorp's letter, the Commission opened a show-cause proceeding to address Sierra Club's disclosure. On August 18, 2014, Chief ALJ Mike Grant held a prehearing conference in which he concluded that Sierra Club had committed a prima facie violation of the protective order. The Commission then opened docket UM 1707 to investigate and address the disclosure. Chief ALJ Grant explained that the investigative proceeding was a show-cause proceeding in which Sierra Club would be given the opportunity to defend its actions before the Commission made any ruling on Sierra Club's violation. The parties briefed the issue on the merits, and on October 15, 2014, Sierra Club was permitted to defend its actions in oral argument before the Commission. On November 6, 2014, the Commission issued an order finding that

Sierra Club's disclosure of certain information constituted a violation of the protective order, that Sierra Club's use of the information was negligent and improper, and, in lieu of sanctions, required Sierra Club to train its employees regarding the protective order and the Commission's rules and conduct a presentation before the Commission to ensure Sierra Club's understanding of these requirements.²

At the same time, proceedings in LC 57 followed a separate track. On August 22, 2014, Sierra Club filed a motion in docket LC 57 challenging PacifiCorp's designation of the technical workshop materials as confidential. The parties briefed the issue in accordance with the procedure envisioned by the protective order. On January 6, 2015, ALJ Pines held a prehearing conference in the proceedings challenging PacifiCorp's confidentiality designations. Sarah Wallace appeared on behalf of PacifiCorp, and Gloria Smith appeared on behalf of the Sierra Club. During that conference, ALJ Pines stated that she intended to accept Sierra Club's proposed re-designation of the workshop materials and expressly asked the parties whether the proposed ruling would finally settle the parties' dispute. Sierra Club did not raise any concern with ALJ Pines' proposed ruling or otherwise indicated that it sought any additional relief in this docket.³ In accordance with her proposed ruling, ALJ Pines issued a formal ruling on January 9, 2015, re-designating the confidentiality of the workshop materials.

² *In re Sierra Club, Regarding Violation of Protective Order No. 13-095*, Docket No. UM 1707, Order No. 14-392 (Nov. 6, 2014).

³ During the prehearing conference, ALJ Pines stated that she intended to issue a ruling adopting Sierra Club's re-designation of the workshop materials. She then asked the parties, "Are there any remaining issues that the parties are requesting that the Commission can help them resolve for this particular dispute? [Aside from Sierra Club's general concerns with the protective order raised in docket LC 62] . . . with regard to this particular docket, is there anything else that the parties are asking us to address? So, does that settle the issue?" After PacifiCorp's representative responded, the ALJ asked "Ms. Smith, did you have any other issues particular to this docket that you are requesting our assistance in resolving?" Sierra Club's attorney responded, "Nothing at this time, Your Honor."

On January 23, 2015, Sierra Club filed its current Request. Sierra Club's Request takes issue with ALJ Pines' ruling and seeks, in addition to ALJ Pines' finding that re-designation of the workshop materials is appropriate, a separate and explicit finding that PacifiCorp violated the terms of the protective order.⁴

III. LEGAL STANDARD

Sierra Club seeks certification of the ALJ's January 9, 2015 ruling re-designating PacifiCorp's written technical workshop presentation. The standard for certification of an ALJ ruling is set forth in OAR 860-001-0110(2), which provides that an ALJ must certify a ruling if: "(a) the ruling may result in substantial detriment to the public interest or undue prejudice to a party; (b) the ruling denies or terminates a person's participation; or (c) good cause exists for certification." In the alternative, Sierra Club seeks "clarification" of the ALJ's January 9 ruling.

The Commission's general protective order is "specifically tailored to safeguard confidential commercial information from unauthorized disclosure."⁵ Recognizing that the precise designation of confidential materials may be impractical under various circumstances, paragraph 4 of the protective order states that, "*to the extent practicable*, the [designating] party may designate as confidential only the portions of the material covered by ORCP 36(C)(7)."⁶ The protective order further states that a party may designate information as confidential so long as the party "reasonably believes" the information falls within the scope of ORCP 36(C)(7).⁷

⁴ Sierra Club Request at 5. In the alternative, Sierra Club asks the ALJ to certify this issue to the Commission.

⁵ *In re Qwest Corp.*, Docket No. UM 1205, Order No. 03-533 at 6 (Aug. 28, 2003).

⁶ Order No. 13-095, App. at 1 (¶ 4) (emphasis added).

⁷ *Id.* at 1; *see also* OAR 860-001-0080(2)(b).

The protective order thus recognizes that designation of confidential materials may be imprecise due to the circumstances under which the material must be provided or due to a party's reasonable beliefs about confidentiality. The order therefore provides a straightforward process for one party to challenge another party's designation of confidential materials. Under the terms of the protective order, any party may challenge any other party's designation of material as confidential.⁸ Once a designation is challenged, the party seeking protection must demonstrate that the challenged information is covered by ORCP 36(C)(7). If the parties are unable to resolve a dispute over a confidential designation informally, a party may file an objection to the confidential designation.⁹ If the challenging party prevails, the Commission will re-designate the information as non-confidential.¹⁰

This process is separate and distinct from a proceeding to determine whether a party "violated" a protective order. Under OAR 860-001-0080(4), if the Commission finds, after investigation, that a party has violated a protective order, the Commission may impose sanctions.

IV. ARGUMENT

Sierra Club's request that the ALJ clarify (or the Commission find) that PacifiCorp has violated the protective order in this docket is meritless. Sierra Club confounds the process used to challenge the designation of confidential information set forth in paragraph 15 of the protective order with the Commission's process for determining whether a protective order has been breached.

⁸ *Id.* at 1, App. A at 1 (¶ 6).

⁹ Order No. 13-095, App. A at 3-4 (¶ 15).

¹⁰ *Id.*

In this case, the Commission has never issued a show-cause order initiating an investigation into whether PacifiCorp violated the protective order in this docket. ALJ Pines issued a ruling requiring PacifiCorp to re-designate the confidential portions of the technical workshop presentation in accordance with paragraph 15 of Order 13-095, but that ruling was appropriately limited to requiring PacifiCorp to “show that the challenged information is covered by ORCP 36(C)(7) or is exempt from disclosure under the Public Records Law.”¹¹ Nothing in that ruling required PacifiCorp to address whether its designation was made in good faith or otherwise met the standards of the protective order. In addressing Sierra Club’s challenges to PacifiCorp’s designation of confidential material, the Commission followed the procedures contemplated by the protective order. For these reasons, Sierra Club’s Request should be denied.

The Commission has followed two distinct and appropriate courses with respect to the parties’ disputes over PacifiCorp’s workshop materials. First, recognizing the fact that no party has the right to disclose information designated confidential by another, the Commission issued a show-cause order in docket UM 1707, providing Sierra Club with the opportunity to defend itself against potential sanctions for its unauthorized disclosure.¹² Second, recognizing that parties may have disputes about whether material

¹¹ *Ruling: PacifiCorp to Redesignate Workshop Presentation* at 2 (Oct. 17, 2014). The ALJ’s ruling is consistent with paragraph 15 of the protective order, which states:

Any party may request that the ALJ conduct a conference to help resolve disputes related to this protective order. A party challenging the designation of information as confidential may file an objection with the ALJ that identifies the information in dispute and includes a certification that reasonable efforts to achieve an informal resolution have been unsuccessful. Within seven days of the objection, unless otherwise ordered by the ALJ, the designating party must either remove the confidential designation or file a written response identifying the legal basis for the claim of confidentiality. The challenging party may file a written reply to any response within seven days. If the designating party does not timely respond to the motion, the Commission will remove the confidential designation from the challenged information.

¹² See Chief ALJ Grant’s E-mail to PacifiCorp and Sierra Club Memorializing Decisions Made at 8/18/14 Telephone Conference at 1, 2 (docketed in UM 1707 on August 18, 2014).

is properly designated as confidential, the Commission conducted proceedings in this docket to resolve a dispute over PacifiCorp's designation of those workshop materials as confidential by following the dispute resolution process contemplated by the protective order.¹³ Sierra Club's attempt to conflate these two procedures is frivolous and unfounded.

A finding that the party has over-designated material as confidential is a resolution of a discovery dispute that is properly addressed under the terms of the protective order. The Commission's general protective order recognizes that materials may at times be over-designated without any bad faith on the part of the designating party and provides a procedure for dispute resolution. The Commission has repeatedly acknowledged that Sierra Club's challenge to PacifiCorp's designation of the workshop materials is separate and distinct from the show-cause proceeding.¹⁴

Sierra Club quotes Chief ALJ Grant for the proposition that, "[i]f a party designates publically available information as confidential, the party has violated the terms of the protective order."¹⁵ PacifiCorp respectfully suggests that Chief ALJ Grant's statement is taken out of context. The Commission's general protective order prohibits a party from designating publicly available information as confidential, but only to the extent it is "practicable" to avoid doing so.¹⁶ If the Commission were to adopt Sierra

¹³ See, e.g., Chief ALJ Grant and Chief ALJ Pines' October 6, 2014 Ruling, Docket Nos. UM 1707 and LC 57.

¹⁴ See, e.g., Chief ALJ Grant and Chief ALJ Pines' October 6, 2014 Ruling, Docket Nos. UM 1707 and LC 57.

¹⁵ Sierra Club Request at 1 (citing Ruling Denying Motion for Certification, Docket No. LC 62 (Jan. 2, 2015)). Sierra Club also suggests that PacifiCorp acted in bad faith by continuing to argue that certain materials were confidential (Sierra Club Request at 2-4), though the record shows that PacifiCorp was engaged in a legitimate dispute with Sierra Club during this time period and that the Company complied in every respect with the Commission's rulings.

¹⁶ Order No. 13-095, App. at 1 (¶ 4).

Club's proposed standard, a party would be subject to potential sanctions each time it engaged in a legitimate dispute over the proper handling of confidential material.¹⁷

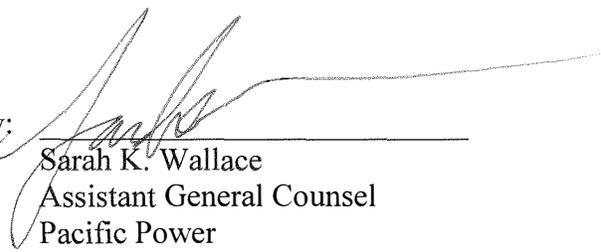
The Commission has handled Sierra Club's challenge to PacifiCorp's designation of confidential materials in accordance with the terms of the protective order. Sierra Club's motion lacks any legal or factual basis upon which relief may be granted and should therefore be denied.

V. CONCLUSION

Sierra Club's request to turn its challenge to the Company's designation of confidential materials into a show-cause proceeding is frivolous and unfounded. Neither the ALJ nor the Commission initiated an investigation into whether PacifiCorp breached the protective order. The record in this docket therefore provides no legal or factual basis that would support Sierra Club's request for relief. PacifiCorp respectfully requests that the Commission deny Sierra Club's Request.

Respectfully submitted this 6th day of February, 2015.

By:



Sarah K. Wallace
Assistant General Counsel
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¹⁷ OAR 860-001-0080(4).

CERTIFICATE OF SERVICE

I certify that I served a true and correct copy of PacifiCorp's Response to Sierra Club's Request to the ALJ to Clarify or Certify ALJ Ruling Granting Sierra Club's Motion on the parties listed below via electronic mail and/or Overnight Delivery in compliance with OAR 860-001-0180.

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Dated this 6th of February, 2015.

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